of the Court of Appeals for the Third Circuit in United States v. One Dodge Sedan, 1940, 3 cir., 113 F. 2d 552, 553, adequately covered our views on that subject when it stated that '* * * only the shibboleth of "stare decisis" has saved it from express repudiation.' A consideration of the subsequent holdings of the Supreme Court, discussed above, lead us to the conclusion that in the case before us neither the judicial doctrine of res judicata nor the constitutional mandate against double jeopardy operates to prevent the action here involved.

"RES JUDICATA. Where a right, question or fact has been put in issue and determined by a court of competent jurisdiction, as a ground of recovery, it cannot again be disputed in a subsequent suit between the same parties or their privies. Southern Pacific R. Co. v. United States, 1897, 168 U. S. 1, 48. But the Supreme Court has held that neither the doctrine of res judicata nor the rule of the Coffey case has application to a situation where there has been an aquittal on a criminal charge followed by a civil action requiring a different degree of proof.[4] Helvering v. Mitchell, 1938, 303 U. S. 391.

"Hence, since the prior action by the government was criminal in nature, while the cause before is civil, the doctrine of res judicata does not operate to make the acquittal a bar. Helvering v. Mitchell, supra.

"DOUBLE JEOPARDY. The principle behind the double jeopardy provision of the Fifth Amendment to the United States Constitution is that when a person has been acquitted on the merits the government shall not prosecute him a second time for the same offense. United States v. Oppenheimer, 1916, 242 U. S. 85. Since it is admitted that the libels filed herein did not seek to condemn the same shipment of preparation which was involved in the prior criminal action it is immediately apparent that there is no question of double jeopardy involved. This factor also distinguishes the case from our opinion in National Surety Co. v. United States, 1927, 9 Cir., 17 F. 2d 369, which case must be read with more recent expressions of the Supreme Court in mind. In addition, the Supreme Court has held in the Various Items of Personal Property case, supra, that a proceeding in rem to forfeit property used in committing an offense is not punitive in character, and therefore is not barred by a prior conviction for a criminal offense involving the same transactions. This would seem especially true in a condemnation proceeding under the Federal Food, Drug, and Cosmetic Act, where the purpose is not to punish the owner of the goods but to protect the public health. Ewing v. Mytinger & Casselberry, 1950, 339 U. S. 594; Hipolite Egg Company v. United States, 1911, 220 U. S. 45.

"If the Coffey case is to be considered as the law its doctrine, if taken to rule the instant case, would lead to great governmental limitation and public harm. An acquittal, even through wholly inadequate proof of violation of the Food, Drug, and Cosmetic Act, could practically stop the government from preventing the sale of a most harmful or wholly ineffective nostrum. Extension of the Coffey rule would not be justified unless clearly required.

"There is no doubt that the trial court was faced with a delicate question and, in the necessity of ruling promptly, committed error, which requires the judgment to be,

"Reversed and the cause remanded."

On May 7, 1952, the case having been remanded to the district court and the claimant having stipulated that the product might be destroyed, judgment of condemnation was entered and the court ordered that the product be destroyed.

3776. Misbranding of Gramer's Sulgly-Minol. U. S. v. 103 Bottles, etc. (F. D. C. No. 29674. Sample No. 78537-K.)

LIBEL FILED: August 15, 1950, Western District of Washington; amended libel filed September 21, 1950.

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v. Seattle Brewing & Malting Co., 1905, D. C. Wash., 135 F. 597; United States v. Gully, 1922, D. C. N. Y., 9 F. 2d 959; United States v. 119 Packages, More or Less, of Z-G-Herbs XXX No. 171, Double Strength, 1936, D. C. N. Y., 15 F. Supp. 327.

[4] This is not a case of successive libel proceedings involving the same issues as in Geo. H. Lee Co. v. United States, 1930, 9 Cir., 41 F. 2d 460. See Southern Pacific Co. v. Van Hoosear, 1934, 9 Cir., 72 F. 2d 903.

ALLEGED SHIPMENT: On or about June 29, 1950, by Walter W. Gramer, from Minneapolis, Minn.

PRODUCT: 103 4-ounce bottles of *Gramer's Sulgly-Minol at* Bellingham, Wash., together with a number of leaflets entitled "Walter W. Gramer Co. Manufacturers of Gramer's Sulgly-Minol" and "Arthritis . . . Hundreds claim It's Grip Broken" and a number of circulars entitled "A Light Should not be Hidden."

RESULTS OF INVESTIGATION: Investigation disclosed that the source of the leaflets entitled "Walter W. Gramer Co. Manufacturers of Gramer's Sulgly-Minol" was unknown and that the other leaflets and circulars were printed in Bellingham, Wash.

LABEL, IN PART: "Gramer's Sulgly-Minol A Solution of Sulphur, Glycerine, Sulphurated Lime and Alcohol 6%."

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements on the label of the article and in the leaflets and circulars accompanying the article were false and misleading. The statements represented and suggested that the article was effective as a treatment, cure, and preventive for rheumatism and arthritic conditions and as a treatment for boils and acne. The article was not effective for such purposes. The article was alleged to be misbranded when introduced into, while in, and while held for sale after shipment in, interstate commerce.

DISPOSITION: May 7, 1952. Default decree of condemnation and destruction.

3777. Misbranding of Sobertabs. U. S. v. 50 Vials * * *. (F. D. C. No. 32963. Sample No. 3834–L.)

LIBEL FILED: On or about March 18, 1952, District of Maryland.

ALLEGED SHIPMENT: On or about November 23, 1951, by the Amlo Co., from Chicago, Ill.

PRODUCT: 50 vials of *Sobertabs* at Baltimore, Md., together with a number of display cards headed "Sober-Up Fast" and a number of leaflets entitled "For Really Fast Relief."

Analysis showed that each tablet of the article contained acetophenetidin, 40 milligrams; citrated caffeine, 271 milligrams; niacinamide, 12 milligrams; and thiamine hydrochloride.

LABEL, IN PART: (Vial) "12 Sobertabs * * * Contents: Acetophenetidin, Niacinamide, Caffeine Citrate, Thiamine Hydrochloride."

NATURE OF CHARGE: Misbranding, Section 502 (a), the name "Sobertabs" and other statements on the vial label and accompanying display cards and in the leaflets were false and misleading since they represented and suggested that the article was an adequate and effective treatment for acute alcoholism and all of its manifestations, whereas the article was not an adequate and effective treatment for those conditions.

Further misbranding, Section 502 (e) (2), the article was fabricated from two or more ingredients, and its label failed to bear the quantity or proportion of acetophenetidin contained therein.

DISPOSITION: April 10, 1952. Default decree of condemnation and destruction.